IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Marriage of:	)	No. 55130-2-I
	)	(Consolidated with Nos.
SCOTT WILSDON,	)	56499-4-I and 57031-5-I)
	)	
Respondent,	)	DIVISION ONE
	)	
and	)	
	)	
JULIE E. BARRETT,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: July 24, 2006
	)	
	)	

PER CURIAM – In three consolidated appeals, Julie Barrett challenges the results of modification proceedings following the dissolution of her marriage to Scott Wilsdon. Specifically, Barrett contends that the trial court abused its discretion by refusing to order Wilsdon to advance her attorney fees to prosecute appeals, by modifying the parenting plan as to the primary residence of the couple's children and by later modifying the related child support order.

Because the trial court made the unchallenged finding that Barrett, a licensed attorney, was capable of financially providing for herself but was voluntarily unemployed, the court did not abuse its discretion in denying Barrett's request that Wilsdon advance her funds for appeal. The court also did not abuse its discretion in finding a change of circumstances required modification

of the parenting plan based on substantial evidence that Barrett's increasingly erratic behavior was detrimentally affecting the children's education, mental health, and emotional well-being. The court likewise did not abuse its discretion in ordering Barrett to pay nominal child support because the children now reside with Wilsdon the majority of the time and Barrett did not show that she is financially unable to provide for their needs when they are with her. We affirm.

Barrett and Wilsdon dissolved their marriage in 1999. During the marriage, Barrett had stayed home to raise the couple's three children while Wilsdon built a very successful law practice. Barrett and Wilsdon entered an agreed parenting plan, which the court approved. It provided that they would share unrestricted joint decision-making authority over all major issues, including educational decisions. Barrett was designated the primary residential parent.

During the 2002-2003 school year, the three Wilsdon children attended the same private school. In the fall of 2002, a teacher contacted Barrett with concerns about one of the children's attendance and behavior. Barrett disagreed with the teacher's perception of the problem and the school's administrative policies and sent what school officials described as "flaming" e-mails.[1] In November 2002, Barrett met with school administrators, at their request, to discuss the school's policies and the tone and content of her communications. Soon afterward, the head of the school warned Barrett in a letter that the school might end its relationship with her family if she continued to

[1] Exhibits 99, 101.

engage in conduct the school considered detrimental.

In February 2003, the school chose not to reenroll the Wilsdon children for the next school year because of Barrett's continuing behavior. Wilsdon arranged a meeting with school administrators, which Barrett declined to attend. Wilsdon discussed the possibility that administrators might reconsider if he obtained a court order limiting Barrett's contact with the school. The next day, Wilsdon moved for an order directing Barrett to refrain from interference with the school. The school nonetheless indicated it would not change its decision, and Barrett apparently sent more e-mails to faculty and staff.

A family law commissioner denied Wilsdon's motion, but Wilsdon moved to revise the commissioner's ruling. The reviewing judge entered an order permanently limiting Barrett's contact with any school the children attended. Barrett appealed, and this court reversed, holding the order constituted a permanent modification of the parenting plan that was entered without following the statutory requirements for modification, and that injunctive relief was improper because the modification statute provided an adequate remedy at law.[2]

In the meantime, Barrett sued the children's former school for damages, seeking also to force the school to reenroll the children. On the first day of the next school year, Barrett abruptly removed two of the children from their new classrooms after Wilsdon took them to school. Barrett's request for an injunction

[2] See Wilsdon v. Barrett, No. 52183-7-I, unpublished opinion noted at 118 Wn. App. 1028 (2003).

was denied, and the children returned to their new school a few days later.[3]

Concerned by the incidents involving the children's schools, Barrett's resort to police and courts over minor matters, her exposure of the children to legal matters and her interference with their counseling, Wilsdon petitioned to modify the parenting plan. He requested sole educational and health care decision-making authority without changing the children's primary residence. The parties stipulated to adequate cause for the modification, and the court awarded Barrett attorney fees.

Barrett also petitioned for modification, seeking a substantial reduction in Wilsdon's liberal residential time with the children. Barrett alleged that the existing residential schedule was detrimental to the children's emotional health and asserted that Wilsdon had engaged in an abusive use of conflict causing the children psychological harm. At the adequate cause hearing, Barrett's counsel contended that the parties' pleadings together justified a major modification of the parenting plan. The court commissioner agreed. The court appointed the parenting evaluator that Barrett requested, and awarded Barrett additional attorney fees. The parties filed a joint "Confirmation of Issues" acknowledging that the scope of the issues now included a major modification.[4]

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[3] See Barrett v. Seattle Country Day Sch., No. 54009-2-I, noted at 125 Wn. App. 1044, review denied, 155 Wn.2d 1016, 124 P.3d 304 (2005) (affirming trial court's eventual order dismissing Barrett's suit on summary judgment).

[4] Clerk's Papers at 735.

In February 2004, one of the children displayed extreme emotional distress during an incident at the new school after Barrett reportedly told him he would have only one parent in the future. Though the school counselor regarded the matter as extremely serious, Barrett discounted her concerns and declined to provide the child the psychiatric attention that the counselor recommended.

Wilsdon amended his response to Barrett's counter-petition in April 2004, seeking to be designated the children's primary residential parent. Alleging Barrett's mental health and ability to parent had deteriorated, Wilsdon also requested a CR 35 psychological evaluation of Barrett. Barrett, in turn, requested that Wilsdon be required to undergo a domestic violence assessment. The court granted Wilsdon's motion for a CR 35 evaluation of Barrett, and reserved ruling on her request pending the parenting evaluator's report because the evaluator was specifically considering Barrett's allegations of abuse.

At a May 2004 hearing, the trial court confirmed that Wilsdon could seek to modify the residential schedule to become primary residential parent based on the two petitions. Barrett unsuccessfully sought review of that ruling in this court.[5] In June 2004, the trial court granted Barrett a 12-week continuance, awarded her additional attorney fees, and set a deadline for the CR 35 examination. The case was assigned to a new judge for trial.

After a 10-day trial in which Barrett represented herself, the trial judge

[5] See Wilsdon v. Barrett, No. 54307-5-I.

found a substantial change in circumstances required modification of the parenting plan. The court adopted the parenting evaluator's recommendation and ordered that the children's primary residential placement be with Wilsdon. Barrett appealed and moved for a stay of the trial court's order. This court, and later the supreme court, denied her motion for a stay.

Wilsdon, meanwhile, moved to modify child support in the trial court based upon the change of residential placement. Barrett unsuccessfully sought discretionary review in this court. After a trial by affidavit, a court commissioner found Barrett voluntarily unemployed and ruled that she should pay Wilsdon a nominal amount of support. Barrett moved to revise the commissioner's ruling. The trial judge in the parenting plan modification heard and denied the motion. Barrett appealed that ruling, and we consolidated that matter with Barrett's appeal of the parenting plan modification.

Barrett filed unsuccessful motions in this court and the supreme court for an order requiring Wilsdon to advance her attorney fees to prosecute her appeals. She then filed the same motion in superior court under RAP 7.2(d), which was denied by the trial judge from the modification proceedings. We consolidated Barrett's appeal of that order with her other appeals.

Suit Money

Barrett first argues that the trial court erred by denying her September 2005 motion for advance attorney fees. Citing RCW 26.09.140, RAP 7.2(d) and Wilsdon's extensive financial resources, Barrett contends that Wilsdon should

have been required to advance her fees to hire counsel for her appeals. We hold there is no basis for her request.

RAP 7.2(d) provides a trial court discretion to order "suit money" in the form of the advancement of attorney fees for an appeal of a dissolution decree or modification of a decree.[6] We review the trial court's grant or denial of such fees for abuse of discretion.[7] The trial court abuses its discretion if it rules in a manner that was "'clearly untenable or manifestly unreasonable.'"[8]

Here, by the time Barrett made her request for suit money, the trial court was thoroughly informed of the parties' financial circumstances. The court's unchallenged findings in the parenting plan and support modifications included findings that Barrett was an attorney, who, though lacking experience, had high qualifications, could provide for herself and the children while they were in her care, and had voluntarily chosen not to work. The court also had found Barrett's expenses for the time the children were with her were minimal because Wilsdon was paying 100 percent of the cost of such items as tuition, counseling, health insurance, orthodontia, and other school and extracurricular expenses.[9] These

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[6] In re Parentage of J.H., 112 Wn. App. 486, 499, 49 P.3d 154 (2002), review denied, 148 Wn.2d 1024 (2003).

[7] See Bennett v. Bennett, 63 Wn.2d 404, 417-18, 387 P.2d 517 (1963).

[8] In re Marriage of Crosetto, 82 Wn. App. 545, 563, 918 P.2d 954 (1996) (quoting In re Marriage of Knight, 75 Wn. App. 721, 729, 880 P.2d 71 (1994)).

[9] Clerk's Papers at 231, 233, 242.

unchallenged findings are verities.[10] And given these findings, Barrett has not shown an abuse of discretion because there is no rule requiring fees whenever there is a disparity in the parties' financial resources.[11]

Barrett's procedural assignments of error regarding her motion for suit money are also unpersuasive. Her complaint that Wilsdon did not produce his 2004 tax return fails because he provided it earlier. Barrett was not entitled to oral argument on her motion under King County Family Law Rule 5(c)(5), which provides for such hearings without argument. Barrett's complaint that the trial judge did not issue separate findings fails because she cites no authority requiring separate findings. Similarly, Barrett's complaint that another judge should have heard the motion fails because the rule grants the trial judge such authority and the trial judge was the appropriate decision-maker due to her familiarity with the facts, parties, and issues.[12] Finally, Barrett's claim that this court erred by consolidating her appeals is simply wrong.

Parenting Plan Modification

Barrett challenges the trial court's modification of the parenting plan, alleging procedural errors relating to the preliminary finding of adequate cause,

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[10] Marriage of Knight, 75 Wn. App. at 732.

[11] See In re Marriage of Sheffer, 60 Wn. App. 51, 59, 802 P.2d 817 (1990).

[12] See State ex rel. Atkinson v. Church, 37 Wn.2d 814, 817, 226 P.2d 861 (1951).

discovery issues, the denial of her request for a further continuance and the denial of attorney fees. Barrett also apparently means to challenge the substantive decision as against the weight of the evidence. None of these arguments are persuasive.

Under RCW 26.09.260(1) and (2), a court may modify a parenting plan if (1) there has been a substantial change in circumstances; (2) the child's best interests will be served by modification; (3) the present environment is detrimental to the child's well-being; and (4) the harm caused by the change in parenting plan is outweighed by the advantage of the change.[13] A party seeking modification must overcome a strong presumption favoring continuity in a child's life, and we do not disturb a court's decision regarding modification absent an abuse of discretion.[14] In order to obtain a hearing, the petitioner must first establish "adequate cause."[15] Where, as here, the adequate cause determination is based on affidavits, we review the proceedings only for abuse of discretion.[16]

Barrett contends Wilsdon's request to change the residential provisions of

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[13] In re Marriage of Possinger, 105 Wn. App. 326, 337 n.4, 19 P.3d 1109 (2001).

[14] In re Marriage of McDole, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993); In re Marriage of Pape, 139 Wn.2d 694, 715, 989 P.2d 1120 (1999).

[15] RCW 26.09.270.

[16] In re Parentage of Jannot, 149 Wn.2d 123, 127, 65 P.3d 664 (2003).

the parenting plan should not have proceeded because he initially petitioned only for a minor modification and did not formally request to change the children's primary residence until after a local rule confirmation deadline. She argues that the court violated its local rules and her due process rights to timely notice. We disagree.

Barrett's counter-petition for modification, however, expressly cited RCW 26.09.260(1) and (2) and alleged the residential arrangements were "detrimental to the children's physical, mental or emotional health and the harm likely to be caused by a change in environment is outweighed by the advantage of a change to the children."[17] Barrett herself thus stated claims supporting a major residential modification, and the court commissioner gave her clear notice in December 2003 that her position could open the door to an unfavorable result. And after Wilsdon formally requested a change of residential placement in April 2004, the trial court granted Barrett a continuance until October 2004 to prepare.

Under these circumstances, Barrett received more than adequate notice to satisfy the requirements of due process.[18] And even if Barrett could show that former King County Local Rule 94.94(h)(6)(c) applied,[19] a trial court has inherent

[17] Clerk's Papers at 666.

[18] In re Marriage of Ebbighausen, 42 Wn. App. 99, 102-03, 708 P.2d 1220 (1985).

[19] The rule was superseded in September 2004, before the trial date.

power to waive its own rules and when, as here, the record shows no injustice, we presume the court waived its rule for sufficient cause.[20]

Barrett's additional procedural contentions also fail. The CR 35 psychological examination was proper because Barrett's mental condition was in controversy, and the court correctly set forth the examination's scope. The delay in Barrett receiving the examination report before trial was caused by her own delay completing the examination. Denying Barrett's request for another continuance at the beginning of trial was not an abuse of discretion because she did not exercise due diligence seeking her additional witnesses. The court's exclusion of Barrett's proposed witness, Joan Zegree, was not an abuse of discretion because of Barrett's violation of discovery rules.[21] The court's consideration of pre-decree facts, including Barrett's mental health history, was proper because "when a dissolution was uncontested, on a subsequent petition to modify, [such] facts are 'unknown' within the meaning of the statute and can be considered by the trial court."[22] Finally, though Barrett complains that the trial court failed to award her attorney fees for trial, the record shows she was awarded $20,000. Barrett fails to show why a denial of more fees, if she requested them, was an abuse of discretion in light of all of the evidence

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[20] Raymond v. Ingram, 47 Wn. App. 781, 784, 737 P.2d 314 (1987).

[21] See Lancaster v. Perry, 127 Wn. App. 826, 833, 113 P.3d 1 (2005).

[22] In re Marriage of Timmons, 94 Wn.2d 594, 600, 617 P.2d 1032 (1980).

including her other substantial expenditures.[23]

As for the trial court's conclusion that a change of residential placement was necessary, Barrett challenges only one of the court's 35 factual findings, the finding that Wilsdon had not engaged in abusive use of conflict. The parenting evaluator addressed this claim and the record supports the court's determination that Barrett rather than Wilsdon most often made offensive use of litigation. We do not review the trial court's determination that the evaluator was credible.[24]

We also have reviewed the sufficiency of the evidence to support the trial court's central finding that changed circumstances had created an environment so detrimental to the children's well-being that the advantage of changing their residence outweighed the harm. Substantial evidence, that we need not specifically detail here, established the children's substantial emotional and mental distress. That their distress was caused by Barrett's rather than Wilsdon's behavior was the subject of conflicting evidence, and the trial court acted well within its province as trier of fact in finding the parenting evaluator, the children's former teachers and counselors, and Wilsdon credible. The court could reasonably discount the testimony of Barrett's lay witnesses, who were largely unaware of the children's problems and Barrett's erratic behavior, and Barrett's expert witnesses, who relied upon Barrett's version of events. The

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[23] See Clerk's Papers at 8-9.

[24] In re Marriage of Rich, 80 Wn. App. 252, 259, 907 P.2d 1234, review denied, 129 Wn.2d 1030, 1031 (1996).

record also fully supports the finding that Barrett's unfounded insistence that Wilsdon was abusive reflected a "very distorted view of reality."[25]

The evidence, in short, supports the finding that Barrett's parenting behavior was detrimental to the children and required changing their residence. Contrary to Barrett's contention, the trial court was not required to find her an unfit parent to change the residential provisions of the parenting plan.[26] Rather, our thorough review of the record discloses that the trial court applied the correct legal standard and based its factual findings on substantial evidence. The court did not abuse its discretion.

Child Support

Barrett's final challenge is to the support modification. She contends that Wilsdon waived the issue by not raising it at the parenting plan trial, that he should receive no support under the statute because of his wealth, and that the court should have required Wilsdon to continue paying her $7,000 per month to equalize the children's standard of living when they are with her. She alternatively contends any modification before June 2005 was improper because a 2002 order restricted adjustment or modification before that date.

We review a trial court's decision setting child support for abuse of discretion.[27] The amount of support rests in the sound discretion of the trial

[25] Clerk's Papers at 10.

[26] In re Marriage of Velickoff, 95 Wn. App. 346, 353, 968 P.2d 20 (1998).

court.[28] This court will not substitute its judgment for that of the trial court where the record shows that the trial court considered all relevant factors and the award is not unreasonable.[29] Here, we find no abuse of discretion.

Barrett cites no authority for her claim that Wilsdon was required to raise the issue during the parenting plan trial. Moreover, in rejecting this argument, the trial court made the uncontested finding that not trying the two matters together was reasonable to constrain the contentious litigation. The court properly entertained Wilsdon's motion to modify.

Barrett's substantive claims regarding the award of nominal support to Wilsdon under the statute are answered by this court's opinion involving similar facts in In re Marriage of Holmes.[30] In Holmes, we held that under the plain language of the statute, the parent not providing the primary residence is the presumptive obligor, and absent a deviation based upon a finding that the non-primary residential parent cannot support the child's basic needs while in their home, that parent must make a transfer payment.[31] We also held that merely

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[27] Crosetto, 82 Wn. App. at 560.

[28] In re Marriage of Stern, 57 Wn. App. 707, 717, 789 P.2d 807, review denied, 115 Wn.2d 1013 (1990).

[29] Stern, 57 Wn. App. at 717 (citing In re Marriage of Nicholson, 17 Wn. App. 110, 119, 561 P.2d 1116 (1977)).

[30] 128 Wn. App. 727, 117 P.3d 370 (2005).

showing a large difference in income does not justify a deviation.[32]

The trial court found here that that there were no grounds for deviation because Barrett is a voluntarily unemployed attorney with high qualifications, able to provide for the children's expenses without a transfer payment. The court also found that differences in lifestyle did not justify a transfer payment, partly because Barrett overstated her living expenses and Wilsdon's lifestyle. Given these unchallenged findings, under Holmes, the court properly terminated Wilsdon's support obligation and ordered Barrett to make a nominal payment.

Finally, Barrett's claim that the court could not change the existing support order before June 2005 fails because the 2002 order contemplated only a change in income levels, not a change in the children's primary residence.

We affirm each of the trial court's orders in these consolidated appeals.

For the Court:

/s/ Cox, J.

/s/ Grosse, J.

/s/ Schindler, A.C.J.

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[31] Holmes, 128 Wn. App. at 741 (citing In re Marriage of Casey, 88 Wn. App. 662, 665, 967 P.2d 982 (1997)).

[32] Id.